Reply form for the Consultation Paper on Guidelines on the MiFID II/ MiFIR obligations on market data

6 November 2020 | ESMA70-156-3882

Responding to this paper

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **11 January 2021.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.

2. Please do not remove tags of the type <ESMA_QUESTION_GOMD_1>. Your response to each question has to be framed by the two tags corresponding to the question.

3. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.

4. When you have drafted your response, name your response form according to the following convention: ESMA_FOTF_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_GOMD_ABCD_RESPONSEFORM.

5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Consultation on the Guidelines on the MiFID II/MiFIR obligations on market data").

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading Legal Notice.

Who should read this paper

This consultation paper is interesting for you if you are a trading venue, an APA, an SI or a consumer of market data.

General information about respondent

Name of the company / organisation	Association of Proprietary Traders
Activity	Investment Services
Are you representing an association?	☒
Country/Region	Netherlands

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_GOMD_1>

The Association of Proprietary Traders (APT) has 23 member firms based in the Netherlands. Amsterdam is a global center for proprietary trading, where many Anglo-Saxon firms have settled since Brexit and with a history of more than 400 years of market making. From Amsterdam, trading firms ensure continuous trading flows (liquidity) on exchanges around the world, by issuing prices in all circumstances and by continuously buying and selling financial instruments in larger, smaller and sustainable funds. Investors, such as pension funds, thus have the certainty that there is always a counterparty to trade with, because another investor is often not directly available. This allows investors to make immediate investment decisions and control risk more accurately. To guarantee liquidity, trading firms hold short-term stock of financial instruments (warehousing). By continuous presence in the market and willingness to buy if others want to sell or to sell if others want to buy, trading firms also help to smooth out peaks and troughs (volatility) on the markets.

<ESMA_COMMENT_GOMD_1>

Questions

Q1: What are your views on covering in the Guidelines also market data providers offering market data free of charge for the requirements not explicitly exempted in the Level 2 requirements?

<ESMA_QUESTION_GOMD_1>

In our opinion market data providers offering market data free of charge should be explicitly exempted from the level 2 requirements, on the basis of the ‘caveat’ by the market data provider that the data provided does not meet some of the L2 requirements. In case a market data provider would be held accountable for providing the market data according to L2 requirements, the provider could refrain from providing market data free of charge since this requires substantial investments and running costs, especially with regard to the requirement to have scalable capacities in place to ensure that customers can obtain timely access to market data at all times on a non-discriminatory basis and with regard to the requirement to offer unbundled market data.

<ESMA_QUESTION_GOMD_1>

Q2: Do you agree with Guideline 1? If not, please justify.

<ESMA_QUESTION_GOMD_2>

We agree with the Guideline. The Guideline does seem to leave a lot of room to the interpretation of the providers as to what is to be considered cost for producing and disseminating market data. Therefore, we believe that it would be sensible that ESMA reviews the methodologies used by the various providers after 2 years and that based on the findings ESMA might provide further guidance on a more general methodology to be used by all providers. Furthermore, we believe it would be sensible that ESMA provides more specific guidance on what is to be considered a “reasonable margin".

<ESMA_QUESTION_GOMD_2>

Q3: Do you think ESMA should clarify other aspects of the accounting methodologies for setting up the fees of market data? If yes, please explain.

<ESMA_QUESTION_GOMD_3>

Yes. To avoid a large variety of methodologies, to facilitate comparability of market data costs and fees in order to assess the RCB and ensure transparency, predictability and fairness, ESMA could provide further guidance on what are to be considered direct and indirect costs of producing and disseminating market data and a reasonable maximum % of indirect costs (e.g. onboarding administration, invoicing, management etc) in relation to direct costs (e.g. hardware, software and data lines) and on the allocation of shared costs and amortization.

<ESMA_QUESTION_GOMD_3>

Q4: With regard to Guideline 2, do you think placing the burden of proof, with respect to non-compliance with the terms of the market data agreement, on data providers can address the issue? Please provide any other comments you may have on Guideline 2.

<ESMA_QUESTION_GOMD_4>

Yes, we believes this can address this issue. As a more general point, market data policies should be structured to encourage and promote compliance rather than penalise non-compliance. A spirit of cooperation between providers and customers is lacking at the moment and audits are often performed in an unnecessarily antagonistic way. A culture shift is needed, with providers and customers working together on the common aim of liquid and healthy capital markets.

During audits participants are often confronted with conclusions from auditors based on experiences with other participants or based on incorrect assumptions even when a participant explains and proves to the auditor how the data is being used. For example, the use of a certain software provider is sometimes used by auditors as "proof" that certain data has been used for non-display purposes. Also, some auditors have used the volume of orders of a participant as "proof" that the participant must have been non-compliant to their market data policy. Sometimes, customers are charged as the result of an audit based on the “ability to use data” instead of the actual usage of the data.

Therefore, we believe Guideline 2 should explicitly state that non-compliance cannot be based on mere assumptions and that providers must prove that the customer has been non-compliant in its reporting of the data used. And to adequately reflect current usage, the look-back period for penalties should be reasonable, up to a maximum of 2 years.

<ESMA_QUESTION_GOMD_4>

Q5: Do you consider that auditing practices may contribute to higher costs of market data? Please explain and provide practical examples of auditing practices that you consider problematic in this context. Such examples can be provided on a confidential basis via a separate submission to ESMA.

<ESMA_QUESTION_GOMD_5>

Yes, auditing practices can certainly contribute to higher market data costs. Most providers engage auditors with a track record of obtaining certain additional revenue for other providers. These hired auditors are often partly paid on the revenues they raise, which creates the wrong incentives. There is no limit to the period the audit covers and providers can apply penalties whenever they choose.

Therefore, we believe the Guideline should include (a) the restriction that remuneration of a hired auditor cannot be based on turnover achieved, (b) the period covered by the audit should be restricted to a maximum of 2 years and (3) penalties should only be allowed when fraud or negligence is proven.

Additionally, particularly over longer time, it may be challenging to reconstruct in detail which data was used when and where, so many firms pay for more their actual usage has justified. In an audit, the user is often presumed in breach unless it is explicitly proven that this is not the case. We are aware that firms who have challenged this, have sometimes met with the uncooperative response that in that case data will simply no longer be provided.

<ESMA_QUESTION_GOMD_5>

Q6: Do you agree with Guideline 3? If not, please justify, by indicating which parts of the Guideline you do not agree with and the relevant reasons.

<ESMA_QUESTION_GOMD_6>

Yes, we agree with Guideline 3. We do feel par. 40 needs to be slightly adapted, which states: "This aims at ensuring that the distinction in fees and terms and conditions among customers, through the creation of categories, is grounded on objective reasons and not ONLY on the value represented by the data to the customers.". In our opinion the word ONLY should be removed since this seems to indicate that pricing based on the value of the data to the customer is allowed. However we feel this is conflicting with the rule that costs of market data has to be based on cost for producing and disseminating market data.

Furthermore, it should not be possible to charge for (a) “potential” access rather than what data is actually used; so only actual usage is to be considered and not the ability of the trading system to use certain data and (b) multiple times for the use of the same data for differing purposes, particularly for Risk and Compliance which are mandated for investment firms.

<ESMA_QUESTION_GOMD_6>

Q7: Do you agree with the approach taken in Guideline 4? If not, please justify, also by providing arguments for the adoption of a different approach.

<ESMA_QUESTION_GOMD_7>

Yes, we agree and we encourage ESMA to include examples of what is considered charging for the same data multiple times. To provide an example: under current market data policies a user that receives the same data for trading, risk monitoring and position monitoring is charged for the same data three times.

Furthermore, we believe ESMA should consider clarifying that charging for data used for regulatory, risk and compliance related systems (like pre- and post-trade systems, test and fall back support systems/devices, transaction reporting, MAR analysis systems) “support” staff such as developers and IT operations should not be considered as separate categories and has to be excluded from charging, both for display as well as non-display.

<ESMA_QUESTION_GOMD_7>

Q8: Do you agree with Guideline 5? If not, please justify.

<ESMA_QUESTION_GOMD_8>

In theory, we agree with Guideline 5. However, we wonder if this is workable. We believe that technical limitations on different ways of dissemination of data would automatically result in differentiation of technical arrangements beyond the control of a provider. So, even if a provider complies to Guideline 5, the network to access the data used by the customer will always result in a different technical arrangement.

<ESMA_QUESTION_GOMD_8>

Q9: Do you think that ESMA should clarify other elements of the obligation to provide market data on a non-discriminatory basis? If yes, please explain.

<ESMA_QUESTION_GOMD_9>

No.

<ESMA_QUESTION_GOMD_9>

Q10: Do you agree on the interpretation of the per user model provided by Guideline 6? If not, please justify and include in your answer any different interpretation you may have of the per user model and supporting grounds.

<ESMA_QUESTION_GOMD_10>

We fully agree with Guideline 6.

<ESMA_QUESTION_GOMD_10>

Q11: Do you agree with Guideline 7? If not, please justify. In your opinion, are there any other additional conditions that need to be met by the customer in order to permit the application of the per user model or do you consider the conditions listed in Guideline 7 sufficient to this aim? Please include in your answer the main obstacles you see in the adoption of the per user model, if any, and comments or suggestions you may have to encourage its application.

<ESMA_QUESTION_GOMD_11>

Yes, we agree with Guideline 7. As we understand, all market data providers have already implemented per user models for display data, so this should not create practical implementing issues for the providers unless end users of the data cannot be determined or in case they fluctuate rapidly.

<ESMA_QUESTION_GOMD_11>

Q12: Do you agree with Guideline 8? If not, please justify also by indicating what are the elements making the adoption of the per user model disproportionate and the reasons hampering their disclosure.

<ESMA_QUESTION_GOMD_12>

We believe that Guideline 8 should be rephrased in such a way that market data providers should offer the per user model as the standard and only in cases where the users cannot be identified offer an alternative per firm model. “Administrative” costs should not be a (catch all) criterion that can be used to diverge from the standard of the per user model, as this leaves too much leeway for providers. A proprietary trading firm can easily fulfil the requirements of the identification of the individual users, but a broker with (ten)thousands of customers who can access X providers, is not able to determine which customers access which data and would therefore opt for a per firm fee.

<ESMA_QUESTION_GOMD_12>

Q13: Do you think ESMA should clarify other elements of the obligation to provide market data on a per user fees basis? If yes, please explain.

<ESMA_QUESTION_GOMD_13>

Yes, the time period between the formal request of entry by the customer into the per user model and the formal written decision of the market data provider upon that request, including the reasons for approval or denial, should not be more than 3 months

<ESMA_QUESTION_GOMD_13>

Q14: Do you agree with Guideline 9? If not, please justify.

<ESMA_QUESTION_GOMD_14>

We agree.

<ESMA_QUESTION_GOMD_14>

Q15: Do you think ESMA should clarify other elements in relation to the obligation to keep data unbundled? If yes, please explain.

<ESMA_QUESTION_GOMD_15>

Yes, please refer to our answer to Q14.

<ESMA_QUESTION_GOMD_15>

Q16: Do you agree with Guideline 10 that market data providers should use a standardised publication format to publish the RCB information? If not, please justify.

<ESMA_QUESTION_GOMD_16>

Yes, we agree

<ESMA_QUESTION_GOMD_16>

Q17: Do you agree with the standardised publication template set out in Annex I of the Guidelines and the accompanying instructions? Do you have any comments and suggestions to improve the standardised publication format and the accompanying instructions?

<ESMA_QUESTION_GOMD_17>

We refer to our response to Q2. We believe ESMA should include in the Guidelines that it will review the methodologies used by the providers (including this SPT) after 2 years.

<ESMA_QUESTION_GOMD_17>

Q18: Do you agree with the proposed definitions in Guideline 11? In particular, do they capture all relevant market uses and market participants? If not, please explain.

<ESMA_QUESTION_GOMD_18>

We agree to the definitions where display data and users are concerned. However, we feel there are significant potential issues with the very broad definition of non-display data:

The sentence: "ESMA considers it appropriate to quantify the level of use by the number of servers or devices" could lead to a proliferation of market data costs and many discussions with providers. We believe it is not appropriate to quantify the level of usage by the number of servers or devices.

Furthermore, we are of the opinion that ESMA should consider a separate Guideline on non-display data and provide much more detail on this type of data usage. The current definition leaves room for providers to introduce 'creative' policies that broaden the applicability of non-display fees. The following items/questions would need to be addressed:
- No charging for non-display usage with regard regulatory, risk and compliance systems (see our answer to Q7).
- If a non-display fee is applicable for each device, for a customer that has 8 servers for its trading system but only two are using the market data from a specific venue, can the customer be charged for the full 8 servers? In our view, an amendment is needed of the definition of non-display data applicable to the number of devices used by the customer since a device counting methodology will lead to multiple charges for the same data usage and excluding processing devices such as feed handlers that are not making trading decisions.
- Currently, the same data are charged multiple times when used non display in parallel to display. It is practice amongst providers that traders are charged for display usage, but also for the same data that are used in ancillary fashion non-display. Especially for small firms, these fees can be substantial. Non-display fees are often up to 100x the single user fee for the same data, while this is exactly the same data feed used as the data used for display purposes. The difference is purely based on a declaration from the user that the data is used in a non-display application. ESMA should clarify if a non-display fee should be equal to a display user fee, or (if so) what the grounds are to allow a higher fee for this type of data, since the cost of producing and disseminating the data are equal. If a customer uses the data for display purposes and all data is displayed on the screen of the users, the user then should not be able to be charged the (significantly higher) non-display fee when he uses the data in an auto-quoter as well to calculate and amend his prices automatically during the day. This would mean the customer is charged twice for the same data. In our opinion, that is an unfair practice.
- In this context specific guidance on the pricing of non-display fees in general is welcomed. Providers might argue that the large amounts of quotes generated from trading systems have significant cost implications on their systems to process all these quotes. Where currently

there is no difference between display and non-display market data feeds (and the distinction is only based on a declaration by the customer that they use the feed for non-display purposes), it can be expected that providers will amend their products and introduce separate products to which customers have to subscribe if they want to use the data for non-display purposes. There is a substantial risk that this will lead to much higher non-display fees and that these fees will be declared applicable in many more devices.
<ESMA_QUESTION_GOMD_18>

Q19: Is there any other terminology used in market data policies that would need to be standardised? If yes, please give examples and suggestions of definitions.
<ESMA_QUESTION_GOMD_19>

The general category of non-display “Other” is a catch-all that ensures almost every participant pays this fee. This unclear category should no longer be used.

<ESMA_QUESTION_GOMD_19>

Q20: Do you agree with Guideline 12? If not, please justify.
<ESMA_QUESTION_GOMD_20>

We believe this Guideline leaves too much room for providers to be 'creative' with regard to the determination of the costs for producing market data. We believe ESMA should add that it will supervise the used methodology and calculation methods on a regular basis. Furthermore, actual costs should be disclosed to NCAs/ESMA to ensure the RCB provisions are adhered to uniformly.

<ESMA_QUESTION_GOMD_20>

Q21: Do you think there is any other information that market data providers should disclose to improve the transparency on market data costs and how prices for market data are set? If yes, please provide suggestions.
<ESMA_QUESTION_GOMD_21>

We believe this can only be answered when the Guidelines have been implemented.

<ESMA_QUESTION_GOMD_21>

Q22: Do you agree with Guideline 13? If not, please justify.
<ESMA_QUESTION_GOMD_22>

We agree. We would encourage to add to the Guideline that "Expectations must be realistic and non-conflicting with customer security protocols and regulatory compliance rules." Providers might enforce unrealistic requirements on customers. Providers can for instance require customers to have an enablement system in place that is able to provide an audit trial, but it cannot mandatorily require customers to allow auditors to access the customers trading systems or algorithms. This is conflicting with security protocols of many market participants.

<ESMA_QUESTION_GOMD_22>

Q23: Which elements for post- and pre-trade data publication should be required? In particular, are flags a useful element of the publication? Should there be any differences between the different types of trading systems? Is the first best bid and offer sufficient for the purpose of delayed pre-trade data publication?

<ESMA_QUESTION_GOMD_23>

Flags are a crucial element and should be maintained. For post-trade data price, volume, transaction, published time, institution ID and venue ID flags are critical elements. There should be no difference between the different types of trading system. For pre-trade data it is important to consider the impact on users if they were required to move their systems to using delayed data. Pre-trade data is often used for aiding compliance queries and best execution examinations amongst other uses. For most of these use cases the Level 1 (first best bid and offer) data would not be sufficient. Level 1 data does not provide a depth of information necessary to fulfil these use case obligations.

<ESMA_QUESTION_GOMD_23>

Q24: Which use cases of post- and pre-trade delayed data are relevant to you as a data user? What format of data provision is necessary for these use cases, and especially for pre-trade delayed data?

<ESMA_QUESTION_GOMD_24>

Pre-trade data is used in the pre-trade system according to MiFID II regulations to check orders before they are sent to the market (both manual or automatic). It is essential information to guarantee orderly markets and to make sure the customer is compliant to regulations and venue rules. Post-trade data is essential for trade reconciliation, mandatory storage, analysis and reproduction capabilities of the customer. Current formats appear fine.

<ESMA_QUESTION_GOMD_24>

Q25: Do you agree with the definitions of data-distribution and value-added services provided in Guideline 16? Please explain.

<ESMA_QUESTION_GOMD_25>

Yes, we agree to these definitions

<ESMA_QUESTION_GOMD_25>

Q26: Do you have any further comment or suggestion on the draft Guidelines? Please explain.

<ESMA_QUESTION_GOMD_26>

According to paragraphs 8 and 9 of the Draft Guidelines NCA's, such as the AFM in the Netherlands, will have an important role to play with regard to ensure compliance with the

Guidelines. Sanctions with regard to non-compliance have not been specified. However this seems necessary to ensure that the Guidelines will not become a “lex imperfecta”. ESMA should also ensure consistent application across the Union.

In Trendzicht 2021 the AFM writes that “exchanges and platforms are increasingly generating a greater proportion of their income by selling trade market data, including to HFT firms. In 2018, venues generated between 20 and 50% of their turnover with the sales of market data. Market participants point out that exchanges and platforms have market power and that the cost of information has increased. Because the availability of information is important to achieve good pricing and to promote competition between exchanges supervisors have a regulatory role here” (page 46). To fulfil such a role properly, NCA’s need to have instruments to ensure full compliance with these Guidelines.

Furthermore, we would to stress again that in our opinion not enough attention has been given in the Guidelines to the issues surrounding non-display data. The initial responses from market participants have identified many issues surrounding this type of data and especially the practices applied by providers of the data. However, we hardly see those addressed in the Guidelines. So, in this respect, there is still work to do on the Guidelines.

Finally, it should be explicitly stated in the Guidelines, as suggested in other answers, that is should no longer be possible both display as well as non-display to charge for (a) “potential” access rather than what data is actually used; so only actual usage is to be considered and not the ability of the trading system to use certain data, (b) multiple times for the use of the same data for differing purposes, particularly for Risk and Compliance which are mandated for investment firm and (c) for data used for regulatory, risk and compliance related systems (like pre- and post-trade systems, test and fall back support systems/devices, transaction reporting, MAR analysis systems) “support” staff such as developers and IT operations.
<ESMA_QUESTION_GOMD_26>

Q27: What level of resources (financial and other) would be required to implement and comply with the Guidelines and for which related cost (please distinguish between one off and ongoing costs)? When responding to this question, please provide information on the size, internal set-up and the nature, scale and complexity of the activities of your organisation, where relevant.

<ESMA_QUESTION_GOMD_27>

Implementation of the guidelines will substantially reduce the resources spent on market data policies enforced by providers. We will need less FTE’s to check the ever changing and complex policies; we will have savings on usage reporting efforts and there will be no double charging for the same data usage. We believe that these Guidelines will prove to be a significant step forward.

<ESMA_QUESTION_GOMD_27>